NO. .....

In the Supreme Court of the United States

OCTOBER TERM, 1941

OTTO ROSE,
Petitioner and Appellant Below,
VERSUS
UNITED STATES OF AMERICA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Now comes the petitioner herein and appellant below and submits this his brief in support of the foregoing petition for writ of certiorari. The original opinion upon which this petition is requested was entered on the 19th day of May, 1942. Thereafter appellant in the court below filed his petition and brief for rehearing, all of which was on the 16th day of June, 1942, denied, and thereafter on June 26, 1942, the Court, acting through Judges PHILLIPS and SYMES, caused to be entered an order staying the mandate of said Court for a period of thirty days from and after said date, said opinion appearing at pages 89-95, being attached to the printed record herewith submitted, and the order staying mandate appearing at page 100 of the printed record.

JURISDICTION

Petitioner herein seeks a review by certiorari under Section 240a, of the Judicial Code as amended in 28 U. S.

C. A., para. 347, of the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, heretofore entered on the 19th day of May, 1942. The essential facts are that heretofore and on March 5, 1941, petitioner herein was indicted on two separate counts and charged with a violation of Section 145, Title 26, U. S. C. A., said counts charging that during the years 1936 and 1937 said petitioner undertook to and did evade the payment of certain income taxes, all of which is set forth and shown at pages 3 to 9, inclusive of the printed record herewith filed. That thereafter and on the 20th day of March, 1941, a demurrer, together with a motion for a bill of particulars, was filed in the United States District Court in and for the Western District for the State of Oklahoma, all as is shown at pages 9 to 11 of the printed record, which said demurrer and motion were, by the Court, overruled and exceptions duly taken.

Thereafter said cause came on for trial and on the 24th day of April, 1941, a verdict was rendered by a jury, finding petitioner guilty as charged in both counts in the indictment contained, all as is shown at page 12 of the printed record. Upon the rendition of said verdict, and after motion duly filed for a new trial, this petitioner was sentenced by the Court below to serve a term in some penitentiary to be designated of five years upon each count, said terms to run consecutively. Thereafter, said cause was duly and properly appealed to the Circuit Court of Appeals in and for the Tenth Circuit, which said judgment has been hereinabove referred to and is set forth in the printed record as aforesaid and in which said judgment, the said Circuit

Court of Appeals sustained the judgment of the United States District Court in and for the Western District of the State of Oklahoma.

SPECIFICATIONS OF ERROR

(1)

That the Honorable Circuit Court of Appeals erred in the rendition of its judgment for that the Court failed to give proper consideration to the case of *Singer* v. *United States*, 58 Federal Reporter (2d), page 74, and numerous other cases therein and hereinafter cited, wherein it was held that this defendant was and would have been entitled to a bill of particulars, all as was timely requested from the trial court, and by said court denied.

(2)

That the Honorable Circuit Court of Appeals in and for the Tenth Circuit, erred in holding that the testimony of one H. C. Jones, in reference to income tax returns for the years 1935 and 1938, were harmless, irrelevant, and incompetent, for that the said testimony is directly in conflict with the Singer case *supra*, and the case of *Miller* v. *Territory of Oklahoma*, C. C. A., 149 Fed. p. 330-339, and *Coulston* v. *United States*, C. C. A., 51 Fed. (2d) 178-182.

(3)

That the Honorable Circuit Court of Appeals wholly failed to give attention to exhibits set forth at pages 57-85 as is set forth and shown in the printed record herein filed, all of which said exhibits come within the purview of the cases hereinabove and hereinafter set forth, and which are

not relevant to the trial of this cause and could not come within the realm of harmless error, or be considered as a reasonable exercise of the discretion of the trial court.

(4)

That the Honorable Circuit Court of Appeals, in the final paragraph of said judgment rendered, finds and holds in substance, that the fixing of penalites for a criminal offense is a legislative function, and that *ordinarily,* a sentence within the limits of the applicable statute will not be disturbed.

We maintain and we submit to this Honorable Court that this case herein is not an ordinary case, and that if this Honorable Court will review the cases precedent to this case, and all growing out of the same sort of transactions and to which reference is made in the briefs filed herein in the Court below, it will be ascertained and determined that the punishment imposed upon this petitioner is harsh, cruel, and unusual, and that the same should not have been, under the circumstances, assessed against him.

ARGUMENT

Proposition No. I.

That the Honorable Circuit Court of Appeals erred in the rendition of its judgment for that the Court in the case of *Singer* v. *United States*, 58 Federal Reporter (2d) page 74, and numerous other cases therein and hereinafter cited, wherein it was held that this defendant was and would have been entitled to a Bill of Particulars, all as was timely requested from the trial court.

In the presentation of the argument, we desire herewith to call this Honorable Court's attention to the case of *Singer* v. *United States,* 58 Fed. (2d) 74. In that case, with the exception of the amounts involved, the judgment of the Court and the findings made by said Court, were so similar that we present herewith a part of the findings and holdings of the Court.

It will be noted that the Honorable Circuit Court of Appeals said:

> "This is an appeal from a judgment of the District Court entered upon the verdict of a jury convicting the appellant of attempting to defeat and evade a tax upon his income for the year 1926 in violation of section 1114(b) of the Revenue Act of 1926 (26 U. S. C. A., Sec. 1266).
>
> "The defendant was indicted and charged with receiving a net income of $400,338.90 on which he should have paid an income tax of $92,018.49, but instead he filed a return showing no net income.
>
> "His alleged income aggregating $409,788.90 was made up as follows:

Commissions	$ 1,200.00	
Interest	300.00	
Profit from sale of real estate	15,250.00	
Income from partnership	163,570.26	
Other income	240,635.19	$420,955.45
Business Loss—		
Restaurant	9,926.55	
Loss on rent item	1,240.00	11,166.55
Total income		$409,788.90

"From this sum was deducted $9,450 allowance for interest, taxes, contributions, and personal exemptions, which left a net balance of $400,338.90."

The learned Court in passing upon the right of the appellant in that case made the following statement:

"When it appears that the indictment does not inform the defendant with sufficient particularity of the charges against which he will have to defend at the trial, he is entitled to a bill of particulars, if seasonal application is made therefor. The defendant may demand this as a matter of right, even though the indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced bad on motion to quash or demurrer, where the charge is couched in such language that the defendant is liable to be surprised and unprepared. *Tilton* v. *Beecher*, 59 N. Y. 176, 184, 17 Am. Rep. 337; *Watkins* v. *Cope*, 84 N. J. Law 143, 147, 86 A. 545; *State* v. *Bove*, 98 N. J. Law, 350, 353, 116 A. 766; *United States* v. *Eastman* (D. C.), 252 F. 232; *Wilson et al.* v. *United States*, 275 Fed. 571; *Filiatreau* v. *United States*, 14 Fed. (2d) 659 (C. C. A. 6); *Lett* v.

United States, 15 Fed. (2d) 686 (C. C. A. 8); *O'Neill* v. *United States,* 19 Fed. (2d) 322, 324 (C. C. A. 8).

"The indictment in this case did not inform the defendant with such particularity of what he had to meet at the trial as to enable him to prepare his defense without surprise and embarassment. A reading of the record shows this conclusion to be inescapable. The frequent interruptions of the trial to enable the government to give the defendant the information which would have been contained in a bill of particulars show that he was surprised, could not properly prepare his defense, and that his motion for a bill of particulars should have been allowed. For example, the defendant did not know what was meant by the item, 'other income $240,635.19.' It could have meant other income from any source whatever. When the government replied to the defendant's letter stating that it was 'unidentifiable income obtained by an examination of his bank deposit, together with such other records as the books disclose,' it did not give him any real information as to what this income was—what deposit, what records, and what books were not disclosed. The government could not state what constituted the 'other income' without showing the falsity and untenable character of the charge. This item was not set forth with such definiteness and particularity as to enable the defendant to plead it in bar to another prosecution for the same crime."

And in conclusion used this very apt and pertinent language:

"Innocent men may be indicted and convicted, and guilty men may be acquitted, but both good and bad men are alike entitled to the application of the rules of evidence which courts throughout the ages have found to be best for the fair and impartial administra-

tion of the law. When these rules, under the stress and strain of a trial, have been violated, it does not cure the injury to reply with the stereotyped argument that it does not appear it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless."

Miller v. *Territory of Oklahoma* (C. C. A.), 149 Fed. 330, 339, 9 Ann. Cas. 389;

Coulston v. *United States* (C. C. A.), 51 Fed. (2d) 178, 182.

But said Court undertakes to distinguish this case from the Singer case *supra*. The Court's attention is further directed to the fact that the Singer case has been twice followed in the opinions written by Judge KENNEDY of the Wyoming District, same being *United States* v. *Empire Paper Corporation et al.*, and two consolidated cases, 8 Federal Supplement 220, and again in the *United States* v. *Clausen*, 13 Fed. Sup., pages 178-181. This case was again cited in the case of the *United States* v. *Ferrington*, 11 Federal Supplement 215, wherein Judge JOHNSON of the United States District Court in the State of Pennsylvania, in a well reasoned opinion follows the rule as set forth in the Singer case. It appears that in only one case which the writer has been able to find that does not clearly and concisely follow the Singer case, and have the approximate facts in issue, is the *United States* v. *Wexeler*, 6 Federal Supplement at page 250, in which said case, the Honorable Court took issue with the Singer case, and in connection,

said that he was not in sympathy with the reasoning of the Singer case, and since the same did not originate in his District, he respectfully declined to follow the same.

It is apparent that the government and the Honorable Court below rely upon other cases not involving the same issues as are involved herein, as for instance, the case of *Wong Tai* v. *United States,* which said case is reported at 273 U. S. Repts. 77, Supreme Court Reporter, Vol. 47, page 300; Syllabus No. 5 of said case reads as follows to-wit:

> "Application for bill of particulars is addressed to sound discretion of trial court, whose action thereon should not be disturbed in absence of abuse of discretion."

It will be noted that this case was decided on January 3, 1927, while the Singer case, upon which this petitioner relies, was decided finally on April 2, 1932. It is apparent that there is such a wide divergence between the cases and the circumstances surrounding the same, that the rule announced in the Wong Tai case *supra* should not be the controlling case. It would also be noted that the rule laid down in *Hood* v. *United States,* 76 Fed. (2d), page 275, refers also to an opium case, as did *Hood* v. *United States,* 78 Fed. (2d), page 150. Both of which said cases were tried before the Honorable EDGAR S. VAUGHT, Trial Judge in the Court below and it is maintained that the said Court, having established a line of reasoning in the so-called "dope cases," abused his discretion in the case at bar, in that he relied upon those cases as being controlling.

Proposition No. II.

That the Honorable Circuit Court of Appeals in and for the Tenth Circuit, erred in holding that the testimony of one H. C. Jones, Collector of Internal Revenue, to income tax returns for the years 1935 and 1938, were harmless, irrelevant, and incompetent, for that the said testimony of the said H. C. Jones, Collector of Internal Revenue, is directly in conflict with the Singer case *supra*, and the case of *Miller* v. *Territory of Oklahoma*, C. C. A. 149, Federal, pages 330-339, and *Coulston* v. *United States*, C. C. A. 51 (Federal 2d) 178-182.

This Proposition is clearly set forth in Proposition No. I, and will therefore not be repeated here except to redirect the attention of this Honorable Court to the Singer case and the quotations from the above cases therein contained.

In view of these authorities, we respectfully maintain that the lower Court erred in conceding without deciding that the testimony of the said H. C. Jones, although incompetent and irrelevant to the issues, constituted harmless error, for that the Trial Court, as is shown at page 30 of the printed record herewith submitted, states as follows:

> By the Court:
>
> "That is on the theory that the returns of 1935 and 1938 may be material as showing the continuance of the income and conduct."

Exceptions allowed.

It is therefore apparent that the Court, having once suggested that there might be a continuance of wrong doing upon the part of the defendant, it became and was the plain duty of the Court, even without request to cor-

rect the error, if possible the same could be corrected, and withdraw from the minds of the jurors the impression that might have been made by the improvident remarks of the Court. This question was noted by the Honorable Circuit Court of Appeals, and the following cases were cited: *Bogileno* v. *United States*, 38 Fed. (2d) 584; *Reynolds* v. *United States*, 48 Fed. (2d) 762; *Strader* v. *United States*, 72 Fed. (2d) 589; *Hayes* v. *United States*, 112 Fed. (2d) 676; *Miller* v. *United States*, 120 Fed. (2d) 968, but the Honorable Court maintains that such an erroneous and improvident statement upon the part of the Trial Court, was not plainly and clearly prejudicial to the rights of this petitioner.

It is respectfully submitted that the action upon the part of each of the Courts below was erroneous and prejudicial and in substance, had the effect of depriving this petitioner of his constitutional rights to a fair and impartial trial, and will, unless this writ is granted, have the effect of depriving him of his liberty without due process of law.

Proposition No. III.

That the Honorable Circuit Court of Appeals wholly failed to give attention to the exhibits set forth at pages 57-85, as is set forth in the printed record, all of which said exhibits were and are in the judgment of this petitioner, incompetent, irrevelant, and immaterial, wholly prejudical, had no relation to the issues involved in the trial of this cause, and could not come within the realm of harmless error, or be considered as a reasonable exercise of the discretion of the trial court.

The authorities covering this question have been fully set forth hereinbefore. This Proposition is submitted upon the argument made in Propositions No. I and No. II, and the Honorable Court's attention is hereby directed to the said exhibits as is set forth in the printed record.

Proposition No. IV.

That the Honorable Circuit Court of Appeals, in the final paragraph of said judgment rendered, finds and holds in substance, that the fixing of penalties for a criminal offense is a legislative function, and that *ordinarily*, a sentence within the limits of the applicable statute will not be disturbed.

It will be noted that in the concluding paragraph of the Honorable Circuit Court of Appeals' opinion, the statement is made that this question deserves brief notice. We do not contend that the Court below is wrong as a matter of law, but we sincerely maintain that upon an examination of the record as herein set out, that this is not an ordinary case, and that the record will disclose to the Court, upon proper review, that the punishment attempted to be imposed by the Court was harsh, cruel, and unusual.

CONCLUSION

This petitioner, therefore, respectfully urges that the judgment of the Circuit Court of Appeals, sustaining the judgment of the trial court, is contrary to the decisions of this Court and other Courts of competent jurisdiction, and that for the reasons set forth in the petition and this brief herewith submitted, a writ of certiorari should be granted as prayed for in the petition.

Respectfully submitted,

OTTO ROSE,
Petitioner,

By: EDWARD M. BOX,
His Attorney.

July, 1942.

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